

STATE OF MICHIGAN  
COURT OF APPEALS

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DARLENE DUDEK,

Plaintiff-Appellant-Cross-Appellee,

v

ST. JOHN'S HOSPITAL,

Defendant-Appellee-Cross-Appellant.

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UNPUBLISHED

June 11, 2002

No. 230352

Macomb Circuit Court

LC No. 00-002117-NH

Before: Murphy, P.J., and Jansen and Kelly, JJ.

MURPHY, P.J. (*concurring in part, dissenting in part*).

I respectfully disagree with the majority's opinion because it fails to take into consideration the fact that plaintiff underwent seven laparoscopic procedures since 1991, creating great and understandable difficulty in identifying not a new defendant but in identifying the possible cause of her injury. Although plaintiff may have known on January 8, 1998, that the foreign object was left behind from a laparoscopic procedure, such a procedure is involved in a wide range of surgeries, including the 1996 gallbladder surgery and the 1995 hysterectomy. In order to properly allege the cause of plaintiff's injury, it was necessary to determine the particular surgery out of which the alleged negligence arose.<sup>1</sup> Accordingly, I would find that the September 22, 1999 deposition of Dr. Schroder triggered plaintiff's knowledge of a possible cause of action arising out of the 1995 hysterectomy; therefore, plaintiff timely filed the amended complaint, on January 8, 1998, within six months of discovery pursuant to MCL 600.5838a(2).

I agree with the majority that a plaintiff becomes aware of a possible cause of action, for purposes of commencing the time period under the discovery rule, when the plaintiff is aware of an injury and its possible cause. *Solowy v Oakland Hospital Corp*, 454 Mich 214, 221-222; 561 NW2d 843 (1997), citing *Moll v Abbott Laboratories*, 444 Mich 1, 23-24; 506 NW2d 816 (1993).

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<sup>1</sup> If the majority's view is accepted in this case, plaintiff arguably should have brought suit against the physicians and/or institutions where the seven laparoscopic procedures were performed since 1991. I would suggest that this "shotgun" approach would be inconsistent with the intent of the Legislature in its numerous amendments to the medical malpractice statutes.

Here, Dr. Dines' operative report simply notes that it appears that the foreign object was left behind after a laparoscopic surgery without any indication as to a specific surgery. Plaintiff testified at her deposition that Dr. Dines indicated that the foreign object was left behind from the gallbladder surgery. Defendant makes no claim that an operative report was available, or even existed, regarding the gallbladder surgery for plaintiff to review, and it was not until Dr. Schroder's deposition that plaintiff was able to obtain any details regarding the gallbladder surgery. Additionally, the operative report concerning the 1995 laparoscopic procedure indicated that "[a]t the end of the procedure, the sponge, instrument, and needle counts were correct times two." I see no facts presented suggesting that plaintiff knew or should have known that her cause of action arose out of the 1995 hysterectomy, instead of the 1996 gallbladder surgery, prior to the September 1999 deposition, nor do I find any lack of due diligence on plaintiff's part.<sup>2</sup> Therefore, plaintiff's amended complaint is not time-barred.

I am in agreement with the majority that plaintiff failed to sufficiently plead fraudulent concealment, and that the fraud claim was properly dismissed.

Finally, regarding defendant's argument that plaintiff failed to file a new affidavit of merit with the first amended complaint, I would find that the affidavit of merit filed with the original complaint complied with MCL 600.2912d and could be used in correlation with the allegations regarding a foreign object contained in the first amended complaint.

A thorough review of MCL 600.2912d does not indicate any requirement that a plaintiff must file a new affidavit of merit every time an amended complaint is filed, but only the requirement that "an" affidavit be filed in a medical malpractice action. Where the language in a statute is clear, the Legislature must have intended the meaning it has plainly expressed, and the statute must be enforced as written. *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). I would leave for another day the question regarding whether there are some situations where an amended complaint requires the filing of a new affidavit of merit. The statute does not mandate such an action, and under the facts of this case, I see no reason why plaintiff should be required to file a new affidavit of merit, where the allegations of malpractice and breach of the standard of care are essentially the same in both complaints, i.e., a surgical instrument left inside a patient after surgery constitutes medical malpractice. Additionally, the purpose of MCL 600.2912d is to deter frivolous medical malpractice claims, *VandenBerg v VandenBerg*, 231 Mich App 497, 502-503; 586 NW2d 570 (1998), and that purpose had been served in the present case based on the affidavit of merit filed with the original complaint.

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<sup>2</sup> I would reject defendant's and the majority's reliance on *Poffenbarger v Kaplan*, 224 Mich App 1; 568 NW2d 131 (1997). The *Poffenbarger* panel, addressing and rejecting an attempt by the plaintiff to add party defendants through an amended complaint, stated that "[t]he discovery period applies to discovery of a possible claim, not the discovery of the defendant's identity." *Id.* at 12, citing *Weisburg v Lee*, 161 Mich App 443, 448; 411 NW2d 728 (1987). Here, plaintiff did not attempt to add a party through the amendment, and defendant's identity is not at issue; instead the discovery related to the possible cause of the foreign object being left in plaintiff. Therefore, the matter falls within the purview of plaintiff's discovery of a "possible cause of action" as defined in *Solowy*.

I would reverse the trial court's judgment granting defendant's motion for summary disposition.

/s/ William B. Murphy